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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 CARRIE FERRARA CLARK,

4:14-cv-02543

12 Plaintiff,

**DEFENDANT’S RESPONSE TO
13 PLAINTIFF’S CROSS MOTION FOR
14 SUMMARY JUDGMENT**

15 vs.

(Hon. Cindy Jorgenson)

16 CITY OF TUCSON,

17 Defendant.

18 Defendant City of Tucson (“City”) hereby responds to Plaintiff’s Cross Motion for
19 Summary Judgment (Doc. 117).

I. Summary of Disputed Facts

20 The City objects to the majority of Plaintiff’s Separate Statement of Facts
21 (“PSOF”) as set forth in Defendant’s Controverting Statement of Facts in Support of Its
22 Response to Plaintiff’s Cross Motion for Summary Judgment (“City’s Controverting
23 Facts”), filed contemporaneously with this Response. This court should not consider
24 those facts for the reasons stated therein.

25 The City disputes PSOF 17-18, 27-28, 30-31, 35, 56-57, 61-63, 67-68, 78, 91, 97,
26 99, 122, 125, 128-130, 139, 144-146, 151, 156, 158, and 160, for the reasons discussed in
27 the City’s Controverting Facts. These disputes, however, do not create a genuine issue of
28 material fact that would prohibit this court from finding in the City’s favor as to all claims.

1 The City cites to irrefutable admissible evidence in support of each dispute, whereas
2 Plaintiff relies solely on her self-serving declaration and allegations taken directly from
3 her Third Amended Complaint (“TAC”) with no citation to any admissible evidence in
4 support thereof.

5 The only facts from the above listed that are not based on Plaintiff’s self-serving
6 declaration and/or the allegations from her TAC are PSOF 56-57, 68, and 158. (*See* City’s
7 Controverting Facts). PSOF 56-57 incorrectly states it was “five months after Plaintiff
8 first complained of the lack of legally-compliant lactation facilities at TFD Stations” that
9 EOPD looked into the situation. PSOF 68 is a mischaracterization of a memorandum.
10 Lastly, under PSOF 158 Plaintiff claims a memorandum Chief Critchley authored
11 contained reasons and rationale that differed from the Special Evaluation he provided to
12 Gordon Clark, which is untrue.

13 This court should find in favor of the City for the reasons set forth in the City’s
14 Motion for Summary Judgment (Doc. 115) and herein reiterated.

15 **II. The City’s Response to Plaintiff’s Legal Arguments.**

16 **A. Plaintiff has no claim under Section 207(r) of the Fair Labor Standards**
17 **Act (“FLSA”)**

18 Plaintiff must show she lost wages as a result of the City’s violation of FLSA §
19 207(r). She claims that she “was forced to use paid time off to cover what should have
20 been unpaid break time” and “she was forced to work a significant number of additional
21 hours that could have been substituted for paid time off, essentially receiving no wages or
22 overtime for those hours.” (*See* Doc. 117 at 4). These claims are conclusory,
23 unintelligible, and unsupported by any admissible evidence. There is no such thing as
24 “unpaid break time” for City employees. Plaintiff chose to take paid leave based upon her
25 inaccurate belief that certain stations lacked a space for her to express milk in compliance
26 with the law. Her mistake does not provide a legal or factual basis for a claim against the
27 City.

1 Her claim is based solely on EOPD/OEOP investigator Matthew Larsen's findings.
2 His findings, however, were not issued until March 22, 2013. (*See* Doc. 118-1, Ex. R).
3 Yet, Plaintiff claims she took paid leave because she was assigned to stations that were
4 non-compliant with FLSA 207(r) from October 2012 to March 20, 2013. (Doc. 117 at 3-
5 4). Her declaration refers to four stations she claims were non-compliant: Stations 3, 9,
6 19, and 20. (*See* Doc. 118-1, ¶¶37, 38, 41, 46). Stations 3, 19, and 20 had dorm rooms or
7 a private room, respectively, just no locks on the doors. (*Id.*; Doc. 118-1, Ex. Q). Station
8 9 had dorm rooms with curtains and a study room with a window in the door, which could
9 have been covered up. (*Id.*; DSOF 49). Plaintiff used paid leave on various occasions
10 before she was even assigned to a station. (*See* Doc. 118-1, ¶¶ 29-30, 40, 42-43). There
11 was no reason for her to use any leave because all stations were compliant with federal
12 law and she was always paid for the break times she took to express milk. She has not
13 presented any admissible evidence to establish a prima facie case for damages under the
14 FLSA § 207(r). This is also addressed in the City's dispositive motion. (*See* Doc. 115,
15 Section III.A.1.).

16 Plaintiff cannot show the City violated FLSA § 207(r). Her cross motion alleges
17 the following as the bases for her claim: 1) she was assigned to swing shift when she
18 returned to work after her first child's birth, 2) the City/TFD lacked a policy that set forth
19 the law under FLSA, 3) the City's EOPD/OEOP investigator, Matthew Larsen, concluded
20 that some stations were not in compliance with the law, and 5) she was "forced to expend
21 vacation and sick leave" on various occasions between December 2012 and March 20,
22 2013, "[a]s a result of being assigned to stations that did not have legally-mandated
23 lactation spaces." (*See* Doc. 117 Section III.A.).

24 The irrefutable evidence shows she was assigned to swing shift in January 2012,
25 after she completed her probation as a paramedic and before she went on leave for the
26 birth of her first child. (*See* DSOF 12, 13(a); Doc. 118-1, Ex. A2, ¶7). She was not
27 treated differently than any other employee when she was given the assignment, and the
28 law does not require an employer to provide a nursing mother with preferential treatment.

1 (See Doc. 115, Section III.C.2.; FLSA 29 U.S.C § 207(r)). Plaintiff fails to cite to any
2 authority to support her claim that TFD was required to have a specific policy that sets
3 forth the law under FLSA 29 U.S.C § 207(r), there is no such requirement. The City/TFD
4 must comply with the law, and they did.

5 Plaintiff relies solely on EOPD/OEOP investigator, Matthew Larsen’s, findings as
6 “proof” that the City violated FLSA § 207(r). (See Doc. 115, Section III.A.2. at 6). Mr.
7 Larsen, however, misapplied the law. (See Doc. 118-1, Ex. Q). He found that any station
8 that did not have a private room with a door that locks was not in compliance with federal
9 law. (*Id.*). The law does not require an employer provide a locked door, just a space other
10 than a bathroom, that is “shielded from view, and free from any intrusion.” (FLSA, 29
11 U.S.C. § 207(r)). The law also requires an employer to provide reasonable break time to
12 express milk for one year after the child’s birth. (*Id.*). Every station had a space available
13 that was in compliance and Plaintiff was never told she could not have time, or take
14 breaks as needed, to express milk. (*Id.*; DSOF 50, 53). Additionally, Plaintiff testified
15 she never went to a station where she had to use a bathroom to express milk. (DSOF 51).

16 What Plaintiff presumed she was entitled to was a private dorm room at every
17 station. (See DSOF 54). That is not what the law requires. Plaintiff cannot prove the City
18 violated the FLSA § 207(r) and she cannot prove that she lost compensation as a result
19 thereof.

20 **B. Plaintiff cannot present a prima facie case of sex discrimination under**
21 **Title VII, Pregnancy Discrimination Act (“PDA”).**

22 Plaintiff alleges the City took various actions against her in violation of the
23 Pregnancy Discrimination Act (“PDA”). (Doc. 117 at 5-10). The PDA prohibits
24 discrimination based on “pregnancy, childbirth, or related medical conditions.” 42 U.S.C.
25 § 2000e(k). Under the PDA, the City must treat Plaintiff “the same for all employment-
26 related purposes...as other persons not so affected but similar in their ability or inability to
27 work.” 42 U.S.C. § 2000e(k). “Under *McDonnell Douglas*, a plaintiff alleging disparate
28 treatment under Title VII must first establish a prima facie case of discrimination.

1 Specifically, the plaintiff must show that (1) [s]he belongs to a protected class; (2) [s]he
2 was qualified for the position; (3) [s]he was subject to an adverse employment action; and
3 (4) similarly situated individuals outside h[er] protected class were treated more
4 favorably.” *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1123
5 (9th Cir. 2000)(internal citations omitted).

6 Plaintiff’s cross motion alleges she was subjected to sex discrimination from
7 October 2012 through August 2013. In summary, she claims the following are direct or
8 circumstantial evidence of the discrimination: 1) TFD chose not to assign her to Station
9 20; 2) DC Nied and DC Rodriguez made comments to her when she asked to be assigned
10 to Station 12 then denied her request and put it out to bid; 3) she was assigned to “non-
11 compliant” stations; 4) Capt. L’Heureux made a comment to her husband regarding
12 accommodating her; 5) TFD’s HR Manager made comments to her during a phone call; 6)
13 she was disciplined for using “colorful language;” 6) she was assigned to Station 6; 7) AC
14 Fischback made a comment about her filing a complaint; and 8) the City did nothing when
15 she complained about employees’ use of the terms “Carrie Clause” or “Carrie Rule” when
16 referring to the nursing policy. (Doc. 117 at 5-10).

17 Plaintiff’s claim fails because her assignments were not discriminatory, they were
18 based on legitimate business reasons, and the comments she refers to did not result in any
19 adverse employment action. There is no dispute Plaintiff chose not to go to Station 20
20 because she wanted Station 12. (DSOF 18-19, 25; PSOF 10-11, 14-15, 19). She
21 conceded that Paul McDonough was willing to put her at Station 20 until the end of the
22 year. (City’s Controverting Facts, Exhibit 70, pg. 53:19-21). Her first shift back she
23 worked at Station 12. Her mother had to pick up expressed milk three times that day, and
24 after that she decided she would rather work at Station 12, instead of Station 20. (*Id.*, pg.
25 53:22-54:18). Even though she remained on swing shift, she was mainly assigned to
26 Station 12 until January 2013. (DSOF 44; PSOF 26). Station 12 was put out to bid and
27 won prior to the department knowing about her and Paramedic Todd’s requests. (DSOF
28 25). All stations were compliant with federal law and she admitted she never worked at a

1 station where she did not have an appropriate space to express milk. (DSOF 50-51).
2 TFD's HR Manager JoAnn Acosta (Acedo) was not involved in Plaintiff's discipline for
3 using "colorful language" with her superiors. (DSOF 66). Plaintiff was assigned to
4 Station 6 because it was the best place for her considering her need to express milk and
5 the time it took to do so. (See Doc. 115, Section III.C.5.). AC Fischback immediately
6 apologized for his comment and no adverse action was taken as a result thereof. (Doc.
7 115, Section III.C.2. at 14; DSOF 67). Lastly, neither Plaintiff nor her husband wanted
8 the department to do anything about members using the terms "Carrie Clause" or "Carrie
9 Rule." (Doc. 115, Section III.C.5. at 18; DSOF 85-89). In fact, Plaintiff made it clear her
10 and her husband, Gordon Clark, did not consider it harassing and they did not want to
11 make a complaint; therefore she cannot now claim TFD discriminated against her when it
12 closed the investigation. (See Doc. 118-2, Ex. FF, p. 12 of 179).

13 Plaintiff failed to present a prima facie case of sex discrimination under Title VII.
14 She did not show how each of the above listed constituted an adverse employment action,
15 and she did not present evidence that similarly situated individuals outside her protected
16 class were treated more favorably. Even if she could meet her burden of establishing a
17 prima facie case, the City has presented admissible evidence showing each action was
18 taken for legitimate business reasons. It is now Plaintiff's burden to present admissible
19 evidence to show the reasons provided are pre-textual. She cannot do so.

20 **C. Plaintiff was not subjected to a hostile environment constituting sex**
21 **discrimination.**

22 Plaintiff claims she was subjected to a hostile environment because of her need to
23 express milk. (DOC. 117 at 10-14). Plaintiff must show the conduct was because of her
24 desire to express milk at work and that it was "severe or pervasive enough to create an
25 objectively hostile or abusive work environment." *Harris v. Forklift Sys., Inc.*, 510 U.S.
26 17, 21 (1993). "[W]hether an environment is 'hostile' or 'abusive' can be determined
27 only by looking at all the circumstances. These may include the frequency of the
28 discriminatory conduct; its severity; whether it is physically threatening or humiliating, or

1 a mere offensive utterance; and whether it unreasonably interferes with an employee's
2 work performance.” (*Id.* 510 U.S. at 23).

3 Plaintiff’s cross motion sets forth various actions, comments, or conduct that
4 occurred over a 3 ½ year period, which she claims constitute a hostile work environment
5 discrimination. (Doc. 117 at 10-14). Her motion, however, fails to present even a prima
6 facie case of any hostile work environment.

7 **1. After the birth of her first child.**

8 Plaintiff makes a sweeping conclusory statement that her “decision to express
9 breast milk for her newborn son for the first year after his birth was questioned, derided,
10 minimized, dismissed, and ridiculed at every turn.” (*See* Doc. 117 at 11). She refers to
11 numerous PSOF, most of which rely on her self-serving declaration, but she provides no
12 explanation or argument as to why she believes they constitute a hostile work
13 environment. (*Id.*). None of the conduct or actions she refers to rise to the level of
14 “hostile” or “abusive.” Even if this court believes they do, Plaintiff still fails to show that
15 they affected her job performance, discouraged her from remaining on the job, or kept her
16 from advancing in her career. *Harris v. Forklift Syst, Inc.*, 510 U.S. 17, 21-22 (1993).
17 The irrefutable evidence is contrary to her claim.

18 Plaintiff was allowed to work at Station 12 from October 2012 through January
19 2013. (DSOF 25, 44 & PSOF 26). All stations were compliant with federal law, she
20 never worked at a station where she did not have an appropriate space to express milk, and
21 she was never denied time to express milk. (DSOF 50-51, 53). She was assigned to
22 Station 6 in March 2013, giving her a set station to work from thus alleviating any
23 uncertainty of where she would be assigned. (DSOF 69-70). Station 6 is one of the
24 slowest stations and the captain on her shift was also a medic. This provided her with
25 relief from any interruption of expressing milk should an emergency call come in. (*Id.*).
26 She liked Station 6 so much that she requested to remain there well beyond the one year
27 after her first child’s birth. (DSOF 85, 90). In fact, she remained there until June 16,
28 2014, when she requested to go on light duty due to her pregnancy with her second child.

1 (DSOF 104). In June or July 2014, she competed for a position in Fire Prevention.
2 (DSOF 114). A Paramedic may qualify for a lateral move to a Fire Inspector position after
3 a written test and oral interview. (*Id.*) Plaintiff ranked first in the process and was
4 laterally moved to a Fire Inspector position upon returning from maternity leave after the
5 birth of her second child. (*Id.*).

6 **2. After the birth of her second child.**

7 Plaintiff alleges the hostile work environment discrimination “worsened” when she
8 returned to work as a Fire Inspector. (Doc. 117 at 11-14). She bases this on the
9 complaints various TFD members made in December 2014 and January 2015 regarding
10 Captain Langejans (“Capt. Langejans”). (*Id.* at 11-13). She claims the City/TFD “failed
11 to take steps to prevent or promptly remedy the situation,” and that she suffered adverse
12 employment actions as result thereof. (*Id.*). The irrefutable admissible evidence
13 disproves her claim.

14 It is undisputed TFD received complaints from members regarding Capt. Langejans
15 in December 2014 and January 2015. (DSOF 119-127). Not all complaints related to
16 Plaintiff. (*Id.*). TFD investigated all of the allegations and found there was no hostile
17 work environment. (DSOF 128-132, 135). Capt. Langejans was disciplined for making
18 inappropriate comments to his subordinates. (DSOF 133). Plaintiff testified it was a
19 hostile work environment because both males and females were uncomfortable working
20 around Langejans. (DSOF 138). She never heard Langejans make any gender specific
21 comments and the only thing she said was gender specific hostility was him staring at her.
22 (*Id.*). The only comments she could attribute to Langejans were those she heard second
23 hand from Inspectors Sisterman and Vincent. (*Id.*). Langejans did not supervise Plaintiff
24 and he had no effect on her wages, benefits, evaluations, probation or schedule. (DSOF
25 118, 140).

26 Plaintiff did not submit a complaint regarding Capt. Langejans until after TFD
27 completed its investigation and she did so because she was not satisfied with TFD’s
28 disciplinary action against Capt. Langejans. (DSOF 143). Her complaint to EOPD was

1 thoroughly investigated. (DSOF 144-148). EOPD concluded there was no information to
2 support a prima facie case of retaliation or discrimination under the City's Administrative
3 Directive and the City Manager's Office concurred. (DSOF 144, 149). EOPD also
4 concluded TFD was in violation of the City's nepotism policy, which the City Manager's
5 Office agreed with and directed TFD to fix the violation. (*Id.*, DSOF 152). As a result of
6 the nepotism findings, Gordon Clark and other TFD personnel were moved. (DSOF
7 153-156). Gordon Clark was moved back out to Operations in August 2015, which had
8 been part of TFD's succession plan anyway. (DSOF 156-157).

9 Seven months later, in March 2016, Plaintiff filed a wrongful conduct complaint
10 alleging Capt. Langejans was harassing her. (DSOF 166). TFD investigated this
11 complaint and found it to be unfounded. (*See* Doc. 118-3, Ex. JJJ; DSOF 168-169).
12 Plaintiff was issued an educational counseling in March 2016, for reasons completely
13 unrelated to her complaint or Capt. Langejans. (*See* Doc. 118-3, Ex. III; DSOF 170-172).

14 There is no dispute, complaints were made about Capt. Langejans. TFD, EOPD,
15 and the City Manager's Office all looked into the complaints and responded to them. (*See*
16 Doc. 115, Section III.C.8.). Plaintiff's cross motion did not present any admissible
17 evidence to show Capt. Langejans' alleged harassment was due to her status as a nursing
18 mother, nor did she present evidence to show his actions/conduct affected her job
19 performance, discouraged her from remaining on the job, or kept her from advancing in
20 her career. *Harris, supra*. Her claim for hostile work environment discrimination fails as
21 a matter of law.

22 **D. Plaintiff did not show a prima facie case under the *McDonnell Douglas***
23 **burden-shifting framework.**

24 Plaintiff dedicates a separate section in her cross motion to argue she has proven a
25 prima facie case under the *McDonnell Douglas* burden-shifting analysis. (Doc. 117,
26 Section D at 14-15). She argues she has presented a prima facie case because TFD has
27 deviated from its Rules of Assignments for members in the past who were allegedly
28 charged with criminal offenses, and TFD "prohibited" her assignment to Station 12

1 despite the fact that the only other nursing mother in TFD was assigned there. (*Id.*).
2 There are several flaws to her reliance on these “facts” and her argument.

3 Plaintiff presents absolutely no evidence to support her claims regarding other TFD
4 members. She made this same claim to OEOP in January 2013, when Ms. Macias
5 requested she provide documentation to support her allegations, she did not. To date
6 Plaintiff has provided no information to support her allegation. (*See* Doc. 118-1, Ex. J at
7 108 or 194). Even if true, this “fact” alone would not prove TFD discriminated against
8 her because of the complaints regarding lactation spaces or as a result of her status as a
9 nursing mother.

10 With respect to her claims relating to the “only other nursing mother in TFD,”
11 Arianne Phaneuf, she presents no admissible evidence this claim is even true. Instead, she
12 relies solely on her self-serving declaration with no reference to any admissible evidence.
13 Even if true, Plaintiff presents nothing regarding Ms. Phaneuf’s situation. For instance,
14 we do not know Arianne Phaneuf’s position, her seniority in comparison to Plaintiff,
15 whether she bid and won her position at Station 12, or how long she had been at that
16 station. On the other hand, we know Plaintiff was promoted to a paramedic position on
17 January 2, 2011, and assigned to Station 4 for her probationary period. (DSOF 14). She
18 went on light duty shortly before her one year probationary assignment at Station 4 was
19 completed. (DSOF 16). She was assigned to swing shift as of January 2012, the end of
20 her probationary period, and was temporarily assigned to light-duty while pregnant with
21 her first child. (*Id.*). Her assignment to swing shift completing her probationary period as
22 a paramedic in January 2012, was consistent with how all firefighter and paramedic
23 assignments are made. (DSOF 14). When she returned to work after the birth of her first
24 child, she remained on swing shift until TFD assigned her to Station 6 in March 2013.
25 (DSOF 13(b-d)). She remained assigned to Station 6 per her request until June 16, 2014,
26 when she requested light-duty for the pregnancy of her second child. (DSOF 13(d-e)).

27 All actions Plaintiff claims were discriminatory and/or retaliatory were unrelated to
28 her need or request to express milk at work after her first child, and unrelated to any

1 complaints she made either verbally and/or in writing. The reasons for each action taken
2 in the past 3 ½ years are explained in the City’s dispositive motion (Doc. 115) and
3 discussed in the sections above and below. All City/TFD actions were taken for
4 legitimate business reasons. The admissible evidence the City presented in its dispositive
5 motion, and here, demonstrates this. Under the *McDonnell* burden-shifting analysis,
6 Plaintiff must show that the reasons the City provides for these actions are pre-textual.
7 She has not done so in her cross motion and she will not be able to do so in response to the
8 City’s dispositive motion. Contrary to what she claims in her cross motion, she is not
9 entitled to summary judgment under the *McDonnell Douglas* burden-shifting analysis.

10 **E. Plaintiff was not retaliated against in violation of Title VII.**

11 Plaintiff’s cross motion lists out various actions she claims were retaliatory “[o]ver
12 the course of several years.” (Doc. 117 at 16). All of these actions were done for
13 legitimate business reasons as already discussed above and in the City’s dispositive
14 motion. (*See* Doc. 115, Section III.C.1-13.). The City addresses the additional claims
15 Plaintiff asserts in her motion, not already addressed, as set forth below.

16 Plaintiff claims her husband’s transfer from Prevention back out to Operations was
17 retaliatory against her because it was done subsequent to her filing a complaint against
18 Capt. Langejans. (*See* Doc. 117 at 16-17). The undisputable evidence shows otherwise.
19 Gordon Clark was transferred due to the City Manager’s Office directive to TFD to rectify
20 the nepotism policy violation and his transfer had been discussed prior as part of a
21 succession plan for the department. (*See* Doc. 115, Section III.C.9.). He was already on
22 the list to be promoted to Battalion Chief and the department wanted him to return to
23 Operations prior to his promotion. (*Id.*). He was not the only personnel moved as a result
24 of the nepotism policy. (*Id.*).

25 The educational counseling Plaintiff received in March 2016 was not related to her
26 complaint against Capt. Langejans. On its face, the documentation shows she was given
27 this counseling because she was criticizing other inspectors and for disregarding her
28 supervisor’s statements. Capt. Langejans’ name is not even mentioned. (Doc. 118-3, Ex.

1 III). Plaintiff's other retaliatory claims relate to her transfer to Operations, the effective
2 date of said transfer, and her husband's failure of probation as a Battalion Chief. (Doc.
3 117 at 18-20). All of these actions were addressed in the City's dispositive motion. (*See*
4 Doc. 115, Section III.C.10-13.). The City has shown TFD took these actions for
5 legitimate business reasons. (*Id.*). Plaintiff now has the burden to show with admissible
6 evidence that the reasons provided are pre-textual and she cannot.

7 **F. COT did not violate Section 215 of the FLSA.**

8 **1. Interview with OEOP and Assignment to Station 6.**

9 Plaintiff's cross motion claims the City violated Section 215 of the FLSA because
10 she was assigned to Station 6 after meeting with OEOP's Specialist Marty Macias on
11 January 7, 2013, and "alleg[ed] that she was not being provided with an acceptable
12 location to express milk." (Doc. 117 at 20-21). It is clear from Ms. Macias interview
13 notes from January 7, 2013, that Plaintiff did not allege she was not provided appropriate
14 spaces to express milk. (See Doc. 118-1, Ex. J). Plaintiff went to Ms. Macias to discuss
15 the fact that TFD had not permanently assigned her to Station 12. (*Id.*). She specifically
16 told Ms. Macias she wanted Station 12 because it was close to her mother and it would be
17 more convenient for her mother to pick up the expressed milk. (*Id.*). When Plaintiff met
18 with Ms. Macias, the majority of her swing shift assignments had been at Station 12.
19 (Doc.118-4, Ex. XXX at 8 and 10 of 95). On one occasion she was assigned to Station 21
20 and once to Station 7, on October 29, 2012 and December 13, 2012, respectively. (*Id.*;
21 PSOF 13).

22 Plaintiff was assigned to Station 6 on March 22, 2013, after DC Rodriguez and AC
23 Fischback became concerned that Plaintiff's need to express milk may interfere with
24 TFD's ability to respond to emergency calls. (*See* Doc. 115, Section III.C.5. at 17; DSOF
25 59-62, 69 & PSOF 56). Her assignment to Station 6 resulted in her no longer being on
26 swing shift and the captain on her shift was a medic who was able to cover for her should
27 an emergency call come in while she was expressing milk. (DSOF 70). It is one of TFD's
28

1 slowest stations, meaning there was a greatly reduced chance Plaintiff's need to express
2 milk would conflict with the need for an emergency response. (*Id.*).

3 **2. Overtime, Trades, and Station 6's desirability.**

4 Plaintiff was never denied overtime. (*See* DSOF 73-74). In fact, the one time she
5 put her name on the overtime list was in November 2013, when she was assigned to
6 Station 6. (DSOF 75). She worked that overtime shift. (*Id.*; *See* Doc. 115, Section
7 III.C.5. at 17-18). The only trades she was denied was with her husband, Gordon Clark,
8 because he was a captain at the time and only members of equal qualifications can do
9 trades with each other. (*Id.*; DSOF 76-79). Her claim that Station 6 was an "undesirable
10 work location" also has no merit. Plaintiff liked Station 6 so much she insisted she stay
11 assigned there well beyond her first child's one year birthday. (DSOF 84-85). TFD
12 allowed her to do so and she remained there until she requested light-duty in June 2014.
13 (DSOF 104).

14 **3. AC Fischback's comment.**

15 Plaintiff claims AC Fischback's comment is direct evidence the decision to put her
16 at Station 6 was because of her complaint to OEOP. (Doc. 117 at 21-22). Again, her
17 "complaint" in January 2013, was that TFD would not permanently assign her to Station
18 12. (Doc. 118-1, Ex. J). She was not complaining about appropriate spaces to express her
19 milk or reasonable breaks to do so under FLSA § 207(r). (*Id.*). When AC Fischback
20 stated, "well, that's what happens when you file a complaint with EEO," it had already
21 been decided Plaintiff would be assigned to Station 6. (DSOF 69). The decision was
22 made on March 22nd and she received the verbal counseling on March 26th. (DSOF 67,
23 69). Moreover, AC Fischback made the comment in response to Plaintiff again requesting
24 to be assigned to Station 12. (DSOF 67). By this time, Mr. Larsen's findings had come
25 out and Station 12 was considered "non-compliant." (*Id.*; Doc. 118-1, Ex. Q). AC
26 Fischback immediately apologized for the comment and Plaintiff cannot recall any other
27 similar comment that anyone else at TFD thought she should not have gone to EOPD.
28 (*See* Doc. 115, Section III.C.2. at 14; DSOF 67-68).

1 **III. Conclusion**

2 Based on the foregoing, the City’s Motion for Summary Judgment (Doc. 115), the
3 City’s Separate Statement of Facts (Doc. 116) and attached Exhibits (Docs. 116-1, 116-2,
4 116-3, 116-4, 116-5, 116-6), and the City’s Controverting Facts filed contemporaneously
5 with this Response, Plaintiff’s Cross-Motion for Summary Judgment should be denied,
6 and the City should be granted judgment in its favor as to all claims.

7 DATED September 19, 2017.

8
9 MICHAEL G. RANKIN
10 City Attorney

11 By: s/Michelle R. Saavedra
12 Michelle R. Saavedra
13 Michael W. L. McCrory
14 Principal Assistant City Attorneys

15 I hereby certify that on September 19, 2017, I electronically transmitted the
16 attached document to the Clerk’s Office using the CM/ECF System for filing and
17 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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